No. 78-756

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF OHIO, PETITIONER

v.

HERSCHEL ROBERTS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

CITATIONS

Cases—Continued:

Cases—Continued:

Constitution, statutes and rules:

Miscellaneous:

Miscellaneous—Continued:

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INTEREST OF THE UNITED STATES

This case presents an important question regarding the circumstances in which the Confrontation Clause of the Sixth Amendment permits the introduction of the prior recorded testimony of an unavailable witness. Although this is a state prosecution and the prior testimony was admitted pursuant to a state statute, prior testimony of witnesses who subsequently become unavailable is admitted in a substantial number of federal prosecutions pursuant to Fed. R. Evid. 804(b)(1). Given

the same circumstances, we believe the disputed testimony in this case would have been admissible in a federal prosecution under Rule 804(b)(1), which creates an exception to the hearsay rule for the prior testimony of an unavailable witness if the defendant "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" at the prior proceeding. A ruling in favor of respondent would substantially impugn the constitutionality of the federal rule. Accordingly, the United States has a substantial interest in the resolution of the question whether the Confrontation Clause was violated by the introduction of this testimony.

QUESTION PRESENTED

Whether respondent's Sixth Amendment right to confront the witnesses against him was violated by the introduction of the prior testimony of an unavailable witness whom respondent had called and questioned extensively at his preliminary hearing.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.

Ohio Rev. Code Ann. §2945.49 (Page 1953) provides:

> Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony.

Fed. R. Evid. 804(b)(1) provides:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

STATEMENT

1. In January of 1975 respondent was arrested by the local police in Lake County, Ohio, and charged with forgery of a check and receipt of a number of stolen credit cards belonging to Bernard and Amy Isaacs (Pet. App. 15).

At his preliminary hearing in the Mentor Municipal Court, respondent offered the testimony of the Isaacs' daughter, Anita, to substantiate his claim that Anita had allowed him to use the credit cards. Anita Isaacs testified that she was acquainted with respondent and that she had allowed him to stay at her apartment in late December 1974, while she was away (Tr. 282-283). She also admitted that she had been allowed to use certain of her parents' credit cards on occasion (Tr. 284). But instead of corroborating respondent's claim that she had given him permission to use her parents' credit cards, Isaacs denied that she had given respondent any

of the cards and insisted that she had never used or even seen several of the credit cards that had been stolen (Tr. 285–286, 288–289). Respondent's attorney asked a number of leading questions that suggested that Isaacs had given Roberts her parents' credit cards in order to help pay for a television set, but she persisted in her denial (Tr. 289–291). Defense counsel did not ask the court to declare Isaacs a hostile witness so that he could formally cross-examine her, and the State did not question her (see Tr. 292).

The grand jury subsequently indicted respondent for forgery and receipt of stolen property (Pet. App. 16). These charges were consolidated for trial with a second indictment charging respondent with receiving and concealing other stolen property belonging to Mr. and Mrs. Isaacs, and with possession of heroin (*ibid.*).

2. The case was continued numerous times; it finally went to trial before a jury in early March of 1976. The State's evidence established that respondent had been apprehended at a shopping mall where he had attempted to use Bernard Isaacs' credit card to purchase a camera and to use a check signed "Bernard Isaacs" to buy a diamond pendant (Tr. 29–31, 50–60). At the time of his arrest, respondent identified himself as Bernard Isaacs and produced identification in Isaacs' name (Tr. 79–80). A search incident to respondent's arrest revealed that he was carrying a small silver chalice in his pocket; the chalice was later identified as one that had been stolen from the Isaacs' home (Tr. 84–85). After respondent's arrest, a warrant was issued authorizing a search of his automobile, and the officers executing the warrant discovered heroin and other items stolen from the Isaacs' home (Tr. 130–138, 144–145, 158–159).

Respondent testified in his own defense. He stated that he had been living with Anita Isaacs, that Isaacs had her parents' permission to use their credit cards and her father's checks, and that she had given him permission to use them (Tr. 228–232). Respondent

stated that the check was already signed when he received it (Tr. 232).

On rebuttal, the State offered a certified transcript of Isaacs' preliminary hearing testimony pursuant to Ohio Rev. Code Ann. §2945.49 (Page 1953), which permits the introduction of the prior testimony of a witness who is unavailable at the time of trial (Tr. 273–274). Between the issuance of the indictment and the time of trial, the court had issued five subpoenas to Isaacs at her parents' address (Pet. App. 16). Isaacs never responded, and she did not appear at the trial (*id.* at 17). Mrs. Isaacs testified on voir dire that approximately 13 months before the trial Anita had left home, saying that she intended to go to Tucson, Arizona (A. 8). Mrs. Isaacs stated (*id.* at 8–9, 11) that she did not know where Anita was living, and that since the time Anita left, her family had heard from her only twice, most recently during the summer of 1975 when Anita called home, saying only that she was travelling somewhere outside of Ohio.[1] Neither Mrs. Isaacs nor any other member of the family had received any communication from Anita since then and they had no other information as to her whereabouts (*id.* at 8–11).

Respondent objected to the admission of the transcript on the ground that it would violate his right to confront the witnesses against him, and also on the ground that it was not proper rebuttal (A. 12–14). The trial court overruled these objections and admitted the transcript (*id.* at 14).

Respondent was convicted on all counts. He was sentenced to concurrent terms of one to five years' imprisonment for possession of heroin, two to five years' im-

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[1] Mrs. Isaacs also stated that in April or May of 1975, the Isaacs had received a form from San Francisco County stating that Anita had applied for welfare and asking for certain information (A. 10–11). The Isaacs had located Anita at that time through the social worker assigned to her case in San Francisco, and spoke to her once.

prisonment for receipt of stolen property, and to a consecutive term of 18 months to five years' imprisonment for forgery. All of these sentences were to be consecutive with other state sentences respondent was already serving.

3. The Court of Appeals for Lake County reversed respondent's conviction, holding that the admission of Anita Isaacs' preliminary hearing testimony violated petitioner's right to confront the witnesses against him because the State had not made a sufficient showing that Isaacs was not available at the time of trial (A. 5).

The Ohio Supreme Court granted the State's motion for leave to appeal. It upheld the reversal of the conviction, with three justices dissenting (Pet. App. 15–26). The majority disagreed, however, with the lower court's conclusion that the State had failed to show a good faith effort to produce Isaacs at trial,[2] and it held that Section 2945.49 is applicable where, as here, a witness has disappeared (*id.* at 19–20).

Since Isaacs was unavailable at the time of trial, the majority ruled (Pet. App. 20) that her prior testimony would be admissible, but "only if the testimony was given subject to cross-examination by the defendant in a judicial proceeding concerning substantially the same

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[2]The court concluded (Pet. App. 20):

> We hold that in the present cause, the trial judge could reasonably have concluded from Mrs. Isaacs' *voir dire* testimony that due diligence could not have procured the attendance of Anita Isaacs. The last definite word of Anita's whereabouts was that she was in San Francisco in April or May of 1974. Later, her parents learned that she was "traveling" somewhere outside Ohio. From this the trial judge could reasonably infer that Anita had left San Francisco, and that it would have been fruitless for the prosecution to have contacted the San Francisco social worker in order to locate Anita. Therefore, the trial judge could properly hold that the witness was unavailable to testify in person.

issues." Here, although the basic factual issues were the same at the preliminary hearing and the trial, the court concluded (*id.* at 21) that the "ultimate factual issues" were "quite different." The ultimate issue at the preliminary hearing is whether there is probable cause, whereas at trial the issue is whether the defendant's guilt has been proved beyond a reasonable doubt. This "difference in the ultimate object of proof," the court concluded (*ibid.*), "makes a great difference in the defense attorney's strategy." Because "the restriction of the factual issue at preliminary hearing restricts the scope of cross-examination which defense counsel can prudently conduct," the court held (*id.* at 22) that

> the mere opportunity to cross-examine at the preliminary hearing can not be said to afford confrontation for purposes of the trial. * * * [W]here a witness, who testified against the defendant at preliminary hearing and was not cross-examined is later unavailable to testify at the trial, the Sixth Amendment precludes the state's use of the witness' recorded testimony, notwithstanding R.C. 2945.49.

The Ohio court held (Pet. App. 22) that the case was governed by *Barber* v. *Page*, 390 U.S. 719 (1968), where the admission of recorded preliminary hearing testimony of a witness who was not produced at trial was held to violate the Confrontation Clause. In this case, as in *Barber*, the court reasoned (Pet. App. 22), the defendant's failure to cross-examine the witness at the preliminary hearing did not constitute a knowing and intentional relinquishment of his right to confront the witness at trial. The Ohio court concluded (*id.* at 23) that "[t]he later case of *California* v. *Green*, [399 U.S. 149 (1970)], does not hold otherwise." *Green* involved the admission of a witness's preliminary hearing testimony when the witness testified at trial and was available for cross-examination. Accordingly, the Ohio Supreme Court held (Pet. App. 23) that this Court's

statement that the opportunity for cross-examination at the preliminary hearing alone satisfied the Confrontation Clause was mere dictum. Moreover, the court pointed out (*id.* at 24) that even this dictum must be interpreted in light of the fact that the preliminary hearing in *Green* was "quite atypical" in that the witness was cross-examined extensively. Accordingly, the Ohio court concluded that *Green* "goes no further than to suggest that cross-examination actually conducted at preliminary hearing *may* afford adequate confrontation for purposes of a later trial" (*ibid.*; emphasis in original).

Justice Celebrezze's dissent stated (Pet. App. 26):

> In my opinion, the Sixth Amendment to the United States Constitution does not prohibit, under the facts of the instant case, the admission in evidence of the witness' recorded testimony. As was stated in *United States* v. *Allen* * * * 409 F.2d 611, 613, " * * * the test is the opportunity for full and [fair] cross-examination rather than the use which is made of that opportunity. * * * The extent of cross-examination, whether at a preliminary hearing or at a trial, is a trial tactic. The manner of use of that trial tactic does not create a constitutional right."

SUMMARY OF ARGUMENT

I

Respondent examined Anita Isaacs extensively after calling her as a witness at his preliminary hearing, but he did not formally cross-examine her. The principal question posed by this case is whether this direct examination should be treated as the equivalent of cross-examination for purposes of the Confrontation Clause. If so, this case falls comfortably within a long line of decisions recognizing that there is an exception

to the rule of literal confrontation at trial when a witness is unavailable and the prosecution introduces the recorded testimony of the witness at a prior judicial proceeding against the same defendant, which was subject at that time to cross-examination by the defendant.

Direct examination under modern procedural rules can serve the same function as cross-examination. The voucher rule has now been abandoned in the federal system and in many states. Thus, the defendant can use the traditional techniques of cross-examination—such as leading questions—to impeach his own witness if the witness surprises him with adverse testimony or proves to be hostile, biased against the defendant, or unwilling to testify.

The preliminary hearing transcript in this case demonstrates that where these flexible techniques are available, direct examination affords the same opportunity for confrontation as cross-examination. As a technical matter, respondent conducted only a direct examination of Anita Isaacs. But from the point—early in Isaacs' testimony—when it became clear that she was contradicting rather than corroborating respondent's story, the form and tenor of the questioning were identical to the cross-examination one would expect in the same circumstances.

Respondent's direct examination was the substantial equivalent of cross-examination at trial. No restriction was imposed on respondent's detailed questioning. The State did not object to and the trial court did not restrain respondent's use of many leading questions. Respondent explored the details of Isaacs' relationship with respondent, her version of the events in question, and her possible motive for allowing respondent to use her parents' credit cards and checks. Respondent has never suggested any other line of questioning he wished to pursue at trial, and we know of none. Respondent's examination of Isaacs differed from cross-examination

in name only, and it gave him the same opportunity to confront her and to probe the reliability of her adverse testimony.

II

Since respondent's examination of Isaacs at the preliminary hearing was the equivalent of cross-examination, this case is governed by *California* v. *Green*, 399 U.S. 149 (1970), which establishes that there has been substantial compliance with the Confrontation Clause when the accused has conducted a thorough examination of a witness at his preliminary hearing. As this Court pointed out in *Green*, the conditions of the preliminary hearing closely approximate those at the typical trial: Isaacs was under oath, respondent was represented by counsel, he had every opportunity to examine Isaacs, and the proceedings were conducted before a judicial tribunal equipped to record the proceedings. Here, as in *Green*, the opportunity to examine Isaacs under these trial-type conditions allowed respondent to test Isaacs' recollection and sift her conscience so that the trier of fact would have a satisfactory basis for evaluating the truth of her statements. This provided substantial compliance with the purposes of the confrontation requirement.

In cases in which the defendant was afforded an opportunity to examine a witness who testified at his preliminary hearing but failed to do so, or did so only in a perfunctory manner, the question whether there has been substantial compliance with the Confrontation Clause may be more difficult. As the Ohio Supreme Court pointed out, the issue at the preliminary hearing is restricted to probable cause, and either practical or strategic considerations often cause a defendant to limit or forego cross-examination of the prosecution's witnesses. But in this case, as in *Green*, the defendant did avail himself of the opportunity to confront the witness; accordingly, the Confrontation Clause has been satisfied.

ARGUMENT

I. WHEN A WITNESS IS UNAVAILABLE AT THE TIME OF TRIAL, THE ADMISSION OF HIS PRIOR RECORDED TESTIMONY DOES NOT VIOLATE THE CONFRONTATION CLAUSE IF THE DEFENDANT HAD AN ADEQUATE OPPORTUNITY TO CROSS-EXAMINE HIM

The Confrontation Clause was adopted as a reaction to "the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact." *California* v. *Green*, 399 U.S. 149, 156 (1970). It guarantees the defendant "an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States*, 156 U.S. 237, 242–243 (1895). The mission of the confrontation requirement is "to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970), quoting *California* v. *Green*, *supra*, 399 U.S. at 161. See *Parker* v. *Randolph*, No. 78–99 (May 29, 1979), slip op. 10.

Even though the right protected by the Confrontation Clause is "basically a trial right," this Court has traditionally recognized "an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant." *Barber* v. *Page*, 390 U.S. 719, 722, 725 (1968). This exception to the rule of literal confrontation at trial "aris[es] from necessity" and is "justified on the ground that the right of cross-

examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement." *Id.* at 722. See *California* v. *Green*, *supra*, 399 U.S. at 166. As this Court explained in *Mattox* v. *United States*, *supra*, 156 U.S. at 243:

> There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

In sum, this Court's prior decisions establish that where a witness is shown to be unavailable despite the prosecution's good faith efforts to obtain his presence at trial,[3] the Confrontation Clause does not bar the introduction of his recorded testimony taken "at a full-fledged hearing," at which the defendant was represented by counsel who was given "a complete and adequate opportunity to cross-examine." See *Pointer* v. *Texas*, 380 U.S. 400, 407 (1965). So long as the defendant has had "an adequate opportunity to cross-examine" a witness at a prior hearing, and defense counsel has "availed himself of that opportunity," the transcript of that prior testimony is admissible because it bears "sufficient 'indicia of reliability' and afford[s] 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' " *Mancusi* v. *Stubbs*, 408 U.S. 204, 216 (1972), quoting *Dutton* v. *Evans*, *supra*, 400 U.S. at 89.[4]

[3] As the Ohio Supreme Court recognized (Pet. App. 19), the State may introduce prior recorded testimony only when it has established necessity by showing that it had made a good faith effort to produce the witness at trial. *Barber* v. *Page*, *supra*, 390 U.S. at 724–725. The Ohio Supreme Court upheld the trial court's finding that Anita Isaacs could not be produced at trial because her whereabouts were unknown (Pet. App. 20).

The Ohio Supreme Court rested its determination that the Confrontation Clause had been violated on the fact that Anita Isaacs was never cross-examined, and on the further conclusion that the opportunity for examination at the preliminary hearing was not an effective substitute for the opportunity to cross-examine her at trial. The principal question posed in this case is whether respondent's direct examination of Isaacs at the preliminary hearing was the equivalent of cross-examination for purposes of the Confrontation Clause. If so, the case is on all fours with *California* v. *Green*, *supra*, 399 U.S. at 166, which held that the admission of

[4] In *Dutton* v. *Evans* the Court held that a co-conspirator's post-arrest statement was admissible, despite the fact that there had been no actual confrontation, because the statement possessed sufficient "indicia of reliability." Needless to say, *Dutton* did not call into question the line of decisions holding that prior recorded statements are admissible when the reliability of the statement has been guaranteed by exercise of an adequate opportunity for cross-examination, and the subsequent decision in *Mancusi* v. *Stubbs* reaffirmed the traditional analysis. Since this case falls comfortably within the established line of decisions regarding prior recorded statements, there is no need to test the limits of *Dutton* to determine what other factors might be sufficient to establish reliability where there has been no exercise of a meaningful opportunity for actual confrontation.

an unavailable witness's preliminary hearing testimony provided "substantial compliance with the purposes behind the confrontation requirement." At least where, as here, the defendant has had a meaningful opportunity to examine a witness at length at a preliminary hearing,[4a] *Green* holds that the differences between a preliminary hearing and trial are not sufficient to warrant distinguishing between the two for purposes of the Confrontation Clause.

II. DIRECT EXAMINATION MAY BE THE EQUIVALENT OF CROSS-EXAMINATION FOR CONFRONTATION PURPOSES

The function of cross-examination is to provide a basis on which the trier of fact can evaluate the truthfulness of a witness's statements.[5] Cross-examination serves this function by giving the party against whom a witness's testimony is offered an opportunity to develop "(a) the remaining and qualifying circumstances of the subject of the testimony, as known to the witness, and (b) facts which diminish the personal trustworthiness of the witness." 5 J. Wigmore, *Evidence* § 1368 at 36–37 (Chadbourn rev. ed. 1974). Cross-examination enhances the truth determining process by allowing an opposing

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[4a] We assume that one component of such a "meaningful opportunity" is the "similar motive" to which Fed. R. Evid. 804 (b)(1) refers. Even if a defendant has not taken advantage of a previous opportunity to cross-examine a witness who has become unavailable by the time of trial, the admission of the prior testimony of that witness would not violate the Confrontation Clause so long as the defendant's motive to cross-examine at the earlier proceeding was the same as or similar to what it would be at trial. See note 17, *infra*.

[5] "[P]robably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." *Pointer* v. *Texas*, *supra*, 380 U.S. at 404.

party to explore " 'the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion' " of an adverse witness. *Bruton* v. *United States*, 391 U.S. 123, 136 n.12 (1968), quoting 5 J. Wigmore, *Evidence* §1362 at 3 (3d ed. 1940).[6]

Although there have traditionally been certain limitations on the scope of direct examination that have not been applicable to cross-examination, the modern procedural rules now in force in most jurisdictions afford a party substantial latitude in challenging adverse testimony on direct, as well as cross-examination. The most serious limit traditionally placed on the scope of direct examination was the voucher rule,[7] followed in many jurisdictions, which prohibited a party from impeaching his own witness, on the ground that the party " 'vouches for his credibility' " and is bound by anything his witness may say. *Chambers* v. *Mississippi*, 410 U.S. 284, 295, 297 (1973), quoting *Clark* v. *Lansford*, 191 So.2d 123, 125 (Miss. 1966).[8] The voucher rule has been abolished in the federal system, where "[t]he credibility of a witness may be attacked by any party,

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[6] In his Foreword to the *Model Code of Evidence*, Professor Edmund Morgan states that the role of cross-examination is to test "the perception, memory, narration and sincerity of a witness." *Model Code of Evidence* 37 (1942).

[7] "Although the historical origins of the 'voucher' rule are uncertain, it appears to be a remnant of primitive English trial practice in which 'oath-takers' or 'compurgators' were called to stand behind a particular party's position in any controversy." *Chambers* v. *Mississippi*, 410 U.S. 284, 296 (1973).

[8] In *Chambers* this Court concluded (410 U.S. at 297–298) that the application of a state voucher rule denied the defendant due process where it precluded him from questioning a witness about the fact that the witness had admitted committing the crime for which the defendant was being tried.

including the party calling him" (Fed. R. Evid. 607), and in many states as well.[9]

The other principal restriction traditionally placed on the scope of direct examination has been the general rule that leading questions are not permissible on direct, although they are ordinarily allowed during cross-examination. See 3 J. Wigmore, *Evidence* § 769 at 154, §773 at 165 (Chadbourn rev. ed. 1970); 3 *Weinstein's Evidence* ¶611[05], at 611-54 (1978). However, this general rule is subject to an exception that affords substantial flexibility when a witness gives adverse testimony on direct examination: leading questions are permitted when a witness is hostile, biased against the party calling him, or unwilling to testify. 3 J. Wigmore, *Evidence* §774 at 167 (Chadbourn rev. ed. 1970); *McCormick on Evidence* §6 at 10 (2d ed. E. Cleary 1972); Fed. R. Evid. 611(c).[10]

Ohio, like the federal courts, follows these liberalized rules and permits a party to impeach his own witness, and to request a ruling that a witness is hostile so that leading questions may be used on direct examination. See, *e.g.*, *State* v. *Minneker*, 27 Ohio St. 2d 155, 271

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[9] *E.g.*, Ark. Stat. Ann. §28-1001, Uniform Rules of Evidence 607 (Cum. Supp. 1977); Me. Rev. Stat. Ann., Me. R. Evid. 607 (Supp. 1978); Minn. R. Evid. 607; Mo. R. Evid. 607; Neb. Rev. Stat. §27-607 (1975); Nev. Rev. Stat. §50.075 (1973); N.M. Stat.Ann. §20-4-607 (Supp. 1975); N.D. R. Evid. 607; Wis. Stat. Ann. §906.06 (West 1975).

[10] See, *e.g.*, *United States* v. *Karnes*, 531 F.2d 214, 217 (4th Cir. 1976); *United States* v. *Lemon*, 497 F.2d 854, 859 (10th Cir. 1974); *United States* v. *DeBose*, 410 F.2d 1273, 1276 (6th Cir. 1969), cert. denied, 401 U.S. 920 (1971); *Lerma* v. *United States*, 387 F.2d 187, 190 (8th Cir.), cert. denied, 391 U.S. 907 (1968); *United States* v. *Ghaloub*, 385 F.2d 567, 571-572 (2d Cir. 1966); *Bieber* v. *United States*, 276 F.2d 709, 712-713 (9th Cir. 1960).

N.E.2d 821 (1971); *State* v. *Doherty*, 56 Ohio App. 2d 112, 381 N.E.2d 960 (1978).[11]

In the federal system and in states, such as Ohio, where the rules governing direct examination provide a party with ample flexibility to challenge adverse testimony by his own witnesses, the defendant's direct examination of a witness should be treated as the equivalent of cross-examination for purposes of the Confrontation Clause. Under modern state procedural rules—and under the Federal Rules of Evidence—direct examination allows the defendant to develop any qualifying circumstances and any factors that cast doubt on the witness's reliability and trustworthiness. The defendant can impeach his witness by all the traditional means, including any prior inconsistent statements, motives for concealment, or bias. If the witness becomes hostile or evasive, the defendant can request a ruling that permits the use of leading questions.

Since such wide-ranging direct examination permits an accused to "test[] the recollection" and "sift[] the conscience" of an adverse witness, *Mattox* v. *United States*, *supra*, 156 U.S. at 242, it serves the function of assuring the "accuracy of the truth-determining process." *Dutton* v. *Evans*, *supra*, 400 U.S. at 89. Accord-

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[11] Both Ohio cases cited involved the State's direct examination of a witness who had surprised the prosecutor by giving testimony that was inconsistent with the witness's pretrial statement, but they are examples of the general practice permitting the designation of a party's own witness as hostile. See *State* v. *Minneker*, *supra*, 27 Ohio St. 2d at 158, 271 N.E. 2d at 824. The cases state the additional restriction that the State may refresh its witness's memory with his prior statement, but may not introduce the prior statement as evidence of the defendant's guilt. *State* v. *Doherty*, 56 Ohio App. 2d at 113, 381 N.E. 2d at 961.

Under Ohio law, the trial judge has discretion in ruling on a request that a witness be declared hostile. *State* v. *Parrott*, 27 Ohio St. 2d 205, 210, 272 N.E. St. 2d 112, 116 (1971) (upholding trial court's refusal of defendant's request to designate witness as hostile where defendant gave no reason for his request).

ingly, direct and redirect examination should be treated as the equivalent of cross-examination for purposes of the Confrontation Clause. Of course the application of particular procedural or evidentiary rules may lead the trial judge to restrict either direct or cross-examination in a particular case, giving rise to a claim of infringement of the defendant's Sixth Amendment right to confront the witnesses against him, and such claims must be addressed on a case-by-case basis. But there is no reason to differentiate, as a general rule, between direct and cross-examination.

So far as we know, the Confrontation Clause question presented here is one of first impression, and no court has passed on these arguments. But those commentators that have addressed the question have accepted the foregoing analysis and have concluded that direct (and redirect) examination by an accused should be deemed the equivalent of cross-examination for confrontation purposes. 4 *Weinstein's Evidence*, ¶804(b)(1)[05] at 804–66 (1978); *McCormick on Evidence* §255 at 617 (2d ed. E. Cleary 1972); cf. Falknor, *Former Testimony and the Uniform Rules: A Comment*, 38 N.Y.U. L. Rev. 651, 651 n.1, 659–660 (1963).

The Federal Rules of Evidence (as well as the nearly identical Uniform Rules of Evidence) have likewise adopted this analysis and they draw no distinction between prior direct examination and prior cross-examination. Rule 804(b)(1) of the Federal Rules creates an exception to the hearsay rule for "[t]estimony given as a witness at another hearing of the same or a different proceeding * * * if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony *by direct, cross, or redirect examination*" (emphasis added).[12] Although the Advisory Committee Notes for

[12]Rule 804 (b) (1) of the Uniform Rule of Evidence is identical to Fed. R. Evid. 804 (b) (1).

Rule 804 recognize that this Court's prior decisions leave open the question whether direct examination is equivalent to cross-examination for purposes of the Confrontation Clause, the Committee Notes make a strong case for treating them as equivalents (28 U.S.C. App. at 591):

> Under the exception, the testimony may be offered (1) against the party *against* whom it was previously offered or (2) against the party *by* whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. * * * A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness. [Citations omitted.] Allowable techniques for dealing with hostile, doublecrossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice.

III. RESPONDENT'S EXAMINATION OF ANITA ISAACS WAS THE EQUIVALENT OF FULL AND EFFECTIVE CROSS-EXAMINATION

A review of respondent's interrogation of Anita Isaacs at the preliminary hearing provides a vivid example of how direct examination conducted pursuant to modern procedural rules serves precisely the same function as cross-examination. Although Isaacs was called as a defense witness and all of her testimony was technically given on direct examination, it rapidly became clear that she was contradicting—not corroborating—respondent's claims. From that point on, respondent's interrogation of Isaacs served the pur-

pose of cross-examination, and it was conducted in precisely the same way as cross-examination of the same witness would have been conducted. Respondent's opportunity to confront Isaacs was in no way hampered by the fact that it occurred on direct examination, and it would exalt form over substance to treat this examination as insufficient to constitute confrontation merely because it was not termed cross-examination.

Although respondent called Isaacs as a defense witness, it became clear early in her testimony that she was contradicting his claims that she had given him her parents' credit cards, their silver chalice, and her father's checkbook. After a number of introductory questions, defense counsel asked Isaacs if she recognized the packet of credit cards respondent claimed that she had given him to use (A. 18). When Isaacs looked through the cards in the packet, she did not identify them as cards that she had given to respondent; to the contrary, her only comment was that she had never seen many of the credit cards before (A. 18–19). Defense counsel then asked Isaacs if she could identify the small silver chalice that respondent said she had asked him to have appraised (A. 19). Isaacs responded that she had never seen the chalice outside of her parents' home (*ibid.*).

From that point on although defense counsel never asked for a formal ruling that Isaacs was a hostile witness, the form and tenor of his questions became identical to questions asked during cross-examination or direct examination of a hostile witness. Counsel immediately began to use leading questions, asking—in the wake of Isaacs' statement, just moments before, that she had never seen the chalice outside her parents' home —"You have never seen it in your apartment?" (A. 20). At times, his questioning became not only leading, but almost belligerent. For example, counsel stated, "Now, since December 24th, isn't it a fact that you have been in your parents' home?" (*ibid.*). He challenged Isaacs' earlier statements about the credit

cards with the same type of leading questions (A. 21), asking "is it a fact that you have seen these credit cards since the 23rd of December, and isn't it a fact also that you gave these credit cards to [respondent]?" Despite Isaacs' denials, defense counsel continued to press her in an attempt to establish her motive for giving respondent the cards. Again using a series of leading questions, counsel asked: "You never talked to [respondent], here, about buying a color portable TV set that was his? * * * You never gave him credit cards in order to help pay for that TV set?" (A. 21). Despite her denials, counsel elicited the fact that petitioner had a TV set and that Isaacs had only a $20 "old model" TV for which she had rigged a makeshift antenna (A. 21–22).

Respondent's examination of Anita was thus the equivalent of cross-examination, and it provided him with an ample opportunity for confrontation. The transcript reveals that there were no restrictions on respondent's efforts to confront and question Isaacs. The State did not object to any of the questions, nor did the court ever rule any of them out of order. Neither respondent nor the Ohio Supreme Court has suggested any way in which he was hampered by the fact that he was technically conducting a direct examination. Respondent has never identified any subject that he would have inquired into if he had been given an opportunity formally to cross-examine Isaacs.

Moreover, it was respondent himself who elected to call Isaacs as a witness at his preliminary hearing and thus to create the evidence about which he now complains; and after it became clear that her testimony was adverse to him, he elected to continue his examination in an effort to undermine her adverse comments. The State did not elicit Isaacs' testimony, and it did not seek to frustrate respondent's attempt to shake Isaacs' story. Even apart from traditional notions that a party vouches for the credibility of the witnesses he calls, these circumstances further undermine respondent's

contention that he was unfairly prejudiced by the admission of Isaacs' testimony.

IV. *California* v. *Green* ESTABLISHES THAT THE CONFRONTATION CLAUSE WAS NOT VIOLATED IN THIS CASE

The Ohio Supreme Court attempted to answer the question it believed had been left open by this Court's decision in *California* v. *Green*, namely, whether merely affording the defendant the *opportunity* to cross-examine a witness at the preliminary hearing is sufficient—even if the defendant does not avail himself of that opportunity—to constitute substantial compliance with the confrontation requirement so as to permit the introduction of the witness's statements at trial.

As we have shown above, the premise of this portion of the state court's decision is erroneous: respondent's direct examination of Isaacs was the equivalent of full and unrestricted cross-examination.[13] Accordingly, the remaining question in the case is not, as the Ohio Supreme Court supposed, whether the mere opportunity to cross-examine the witnesses at a preliminary

[13] Accordingly, the Ohio Supreme Court erred in concluding that this case is governed by *Barber* v. *Page* (Pet. App. 22). *Barber* focused on the threshold requirement that the State show that it was unable to obtain the witness's presence at trial before any prior preliminary hearing testimony is offered—whether or not it was the subject of cross-examination. 390 U.S. at 724–725. It expressly left open the possibility that an opportunity for cross-examination at a preliminary hearing—even if not exercised—might satisfy the demands of the Confrontation Clause "where the witness is shown to be actually unavailable," finding it unnecessary to reach that question in the case before it. 390 U.S. at 725–726. And *Barber* certainly did not reject the proposition later upheld in *California* v. *Green*—that preliminary hearing testimony subject to actual confrontation may be introduced at trial when the witness is unavailable.

hearing—even if the defendant does not take advantage of it—suffices to afford substantial compliance with the Confrontation Clause if the government seeks to introduce an unavailable witness's preliminary hearing testimony. The narrower question presented on these facts is whether there has been substantial compliance with the Confrontation Clause when the defendant *has* availed himself of the opportunity to examine a witness at some length at his preliminary hearing, and has been permitted to do so without any significant limitation on either the nature or the scope of his examination. 399 U.S. at 166. Essentially the same question was posed in *California* v. *Green*, where this Court concluded that an extensive and unrestricted cross-examination conducted at a preliminary hearing was not sufficiently different from a cross-examination conducted at "an actual trial to warrant distinguishing the two cases for purposes of the Confrontation Clause." 399 U.S. at 165. Accordingly, the Court ruled that the defendant's cross-examination at the preliminary hearing afforded substantial compliance with the Confrontation Clause.

The factors cited by the Court to justify this conclusion in *Green* are equally persuasive in the instant case. Just as in *Green*, *supra*, 399 U.S. at 165:

> [Isaacs'] statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. [Isaacs] was under oath; respondent was represented by counsel * * *; respondent had every opportunity to [examine Isaacs] as to [her] statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.[14]

[14] As the State points out (Br. 40–41), Ohio's Rules of Criminal Procedure provide that a preliminary hearing is to be conducted under the rules of evidence applicable to criminal trials,

Since here, as in *Green*, respondent's counsel was not "significantly limited in any way in the scope or nature" of his examination at the preliminary hearing—and indeed respondent has never suggested any line of questioning that has not been pursued—the admission of Isaacs' testimony at trial did not violate the Confrontation Clause; the examination actually conducted at the preliminary hearing in both *Green* and this case provided "substantial compliance with the purposes behind the [C]onfrontation [Clause]." 399 U.S. at 166.

Neither respondent nor the Ohio Supreme Court has suggested any reason why this Court's analysis in *California* v. *Green* requires re-examination,[15] and we know of none.[16] The Ohio Supreme Court's opinion,

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the "full right of cross-examination." Ohio R. Crim. P. 5(B) (2), (3).

The only factor that has been suggested as distinguishing this case from *Green* is that in this case respondent was not represented at the preliminary hearing by "the same counsel in fact who later represented him at trial." 399 U.S. at 165. So far as we know, there has never been any suggestion that respondent's first attorney did not represent him adequately. He did not represent respondent at trial because he had in the interim been appointed to a state judgeship.

[15]The Ohio Supreme Court read *Green* narrowly and concluded (Pet. App. 23–24 & n.2) that the portion of the opinion in question was mere dictum. We disagree. The California Supreme Court had held that neither the opportunity for cross-examination at the preliminary hearing *nor* the right to cross-examine the witness at trial regarding his out-of-court statement satisfied the requirements of the Confrontation Clause. See 399 U.S. at 153. This Court made clear that "the California court was wrong on both counts," 399 U.S. at 153, and addressed both issues as alternative holdings. 399 U.S. at 164, 165. But more importantly, even if the relevant portion of the Court's opinion were viewed as dictum, respondent has shown no reason why that analysis is not correct and should not be followed here.

[16]It is worthy of note that, despite the Ohio court's suggestion that the discussion in *Green* is dictum, the *Green* analysis

quoting the dissenting opinion in *Green*, emphasizes the difference between the ultimate issue at trial—guilt beyond a reasonable doubt—and the narrower probable cause issue at the preliminary hearing stage (Pet. App. 21–22). The Ohio Supreme Court reasoned that defense counsel has little incentive to cross-examine witnesses at the preliminary hearing stage, since the issue then is only probable cause. But whatever the factors that may frequently cause defense counsel to forego examination of the adverse witnesses at a preliminary hearing, when the defendant *does* avail himself of the opportunity to confront these witnesses, and he is given a meaningful

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has been followed without exception by the lower federal courts and the state courts in cases involving both preliminary hearings and testimony given in other pretrial hearings. See, *e.g.*, *Phillips* v. *Wyrick*, 558 F.2d 489, 493–495 (8th Cir. 1977), cert. denied, 434 U.S. 1088 (1978) (preliminary hearing); *United States* v. *Lynch*, 499 F.2d 1011, 1023 (D.C. Cir. 1974) (same, but witness found not unavailable); *Havey* v. *Kropp*, 458 F.2d 1054, 1056–1057 (6th Cir. 1972) (same); *United States* v. *Bell*, 500 F.2d 1287 (2d Cir. 1974) (suppression hearing); *United States* v. *Harless*, 464 F.2d 953 (9th Cir. 1972) (same); *United States* v. *King*, 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977) (deposition); *United States* v. *Ricketson*, 498 F.2d 367, 374 (7th Cir.), cert. denied, 419 U.S. 965 (1974) (same); *United States* v. *Singleton*, 460 F.2d 1148, 1152–1153 (2d Cir. 1972), cert. denied, 410 U.S. 984 (1973) (same); *United States ex rel. Duff* v. *Zelker*, 452 F.2d 1009, 1010–1011 (2d Cir.), cert. denied, 406 U.S. 932 (1971) (hearing on voluntariness of confessions).

State cases dealing with preliminary hearing testimony generally reached the same conclusion prior to this Court's decision in *Green*. See, *e.g.*, *Commonwealth* v. *Mustone*, 353 Mass. 490, 233 N.E. 1 (1968); *State* v. *Roebuck*, 75 Wash. 2d 67, 70, 448 P.2d 934, 937 (1968); *State* v. *Crawley*, 242 Ore. 601, 603–607, 410 P.2d 1012, 1014–1015 (1966).

The case cited by the Ohio court (Pet. App. 21) as support for its argument that a preliminary hearing does not provide a sufficient opportunity for cross-examination, *Government of the Virgin Islands* v. *Aquino*, 378 F.2d 540, 549 (3d Cir. 1967), in fact followed the accepted rule permitting the introduction at trial of preliminary hearing testimony.

opportunity to do so, the theoretical differences in motivation have not precluded a finding of substantial compliance with the confrontation requirement.[17]

In our view, the only question where, as here, the defendant has previously examined the witness whose preliminary hearing testimony is proffered, should be whether the earlier opportunity to confront the witness was a meaningful one in light of the circumstances. See

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[17] In a case where the defendant can show that he elected not to cross-examine a prosecution witness, or that he restricted his examination because of the nature of the preliminary hearing or the circumstances of the particular case, he may have a valid objection to the admission of the witness's preliminary hearing testimony. Fed. R. Evid. 804 (b)(1) provides that prior recorded testimony is admissible only where the defendant "had an opportunity *and similar motive to develop the testimony* by direct, cross, or redirect examination" (emphasis added). As the Advisory Committee Notes explain (28 U.S.C. App., page 591), Rule 804 was derived from the common law rule that former testimony is admissible only where the parties and the issues were the same in the prior proceeding, so that the former handling of the witness would be the equivalent of the examination that would have occurred if the witness had been present at trial. The Committee concluded (*ibid.*) that because "identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable."

The Ohio Supreme Court apparently concluded that because the issue at a preliminary hearing is narrower than that at trial, the defendant's "motive" for cross-examination will never be the same in the two proceedings. Although there are no cases on point, we do not believe that Rule 804(b)(1) should be given such a categorical construction. Whatever may be the theoretical differences in motive in the general run of cases, where, as here, the defendant conducts an extensive examination at the preliminary hearing and has no plausible claim that there are other avenues that he would have explored with the witness at trial, it is a fair inference that his motive at the preliminary hearing was the same as it would have been at trial and that the testimony carries with it sufficient assurance of reliability to justify its admission under the Rule as well as under the Constitution.

Mancusi v. *Stubbs*, *supra*, 408 U.S. at 213. If, for example, the trial court arbitrarily restricted the scope of examination at the preliminary hearing, the defendant would have a valid basis for a claim that the confrontation afforded him was not adequate.[18] But *Green* correctly rejected the assumption that simply because the ultimate issue at a preliminary hearing is not absolutely identical to that at trial, the earlier cross-examination was necessarily so restricted as to be inadequate to satisfy the confrontation requirement. The proper inquiry is whether the former examination of the witness was the substantial equivalent of the examination that would have taken place at trial. Since respondent's examination of Isaacs, involving an obvious effort to discredit her adverse testimony, amply meets these criteria, the introduction of her preliminary hearing testimony did not violate the Confrontation Clause.

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[18] The defendant might even seek to show that preliminary hearings in his jurisdiction are so hurried and perfunctory that a a defendant may really have little or no opportunity to cross-examine the witnesses against him. See Graham and Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal Policy Observations*, 18 U.C.L.A. L. Rev. 635, 657 and n.73 (1971). But it has not been suggested in this case that defense counsel was prevented either by prevailing practice or by actions of the court from conducting as thorough an examination as he desired.

CONCLUSION

The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted.

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